No. 22120

IN THE

United States Court of Appeals For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT, wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

BROZ, LONG, MIKKELBORG,
WELLS & FRYER
Robert O. Wells, Jr.
Jacob A. Mikkelborg
Attorneys for Appellants

Office and Post Office Address:
912 Logan Building
Seattle, Washington 98101

METROPOLITAN PRESS SEATTLE, WASH.

SUBJECT INDEX

TABLE OF AUTHORITIES

Table of Cases

Statutes

Annotations & Textbooks

IN THE

United States Court of Appeals For the Ninth Circuit

No. 22120

MARGIE J. ELLIOTT and LON ELLIOTT, wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a judgment entered on a jury verdict for appellee (defendant) on May 9, 1967, and from an order entered on May 12, 1967, denying appellants' motion for a new trial.

There is no issue of jurisdiction in the District Court, where the action is admittedly based upon diversity of citizenship (Title 28 U.S.C. Section 1332). Title 28 U.S.C. Section 1291 gives this court jurisdiction of this appeal.

STATEMENT OF THE CASE

It is admitted (Pretrial Order, R. 41, p. 2) that appellant Margie J. Elliott on January 12, 1966, purchased six bottles of a soft drink beverage called "Like" from a retail grocery store; that appellee bottled and sold to the retailer the product contained in said bottles; that Margie J. Elliott cut her left hand on January 16, 1966; and that said injuries necessitated medical and surgical treatment.

It is undisputed (Tr. 28-30) that appellant's left hand was cut when she, using a bottle opener commonly used for such purposes (Ex. 1), attempted to open one of the bottles of "Like" and the bottle (Ex. 2) fragmented in her hand.

Appellant had personally purchased the beverage on January 12, 1966, carried the six bottles home, and placed them in her refrigerator all without untoward incident (Tr. 25-26). No evidence, apart from opinions expressed by the expert witness presented by the appellee, was offered indicating any abuse of the bottles either in the retail store or by the purchaser.

Between the time the beverage was purchased and January 16, 1966, appellant Margie J. Elliott, using the same opener and the same physical methods, had opened two of the other bottles without incident (Tr. 26, 28-29).

Because of the fragmenting of the bottle and the cutting of her hand, appellant required immediate medical attention (Tr. 42-43). In addition, on August 9, 1966, surgery was performed on appellant's hand (Tr. 92-93; Ex. 5).

Moreover, it is undisputed that, as a result of the ad-

ministration by needle insertion of a brachial block anesthetic preliminary to the August 9, 1966, operation, hemorrhaging and the formation of a hematoma or bruising occurred at the site of the needle insertion causing pain and discomfort in appellant's left shoulder and arm (Tr. 47, 112-113, 189-190, 235).

The medical testimony as to the extent of disability caused appellant by the administration of the anesthetic, and the necessity of surgery to correct conditions caused by the insertion of the needle, is at variance. However, it is agreed that, without surgery, the disability is permanent (Tr. 49-50, 119, 193, 235). In addition, it is undisputed that appellant has some permanent disability in her left hand (Tr. 49-50, 96, 118-119, 191).

Appellant presented the testimony of Charles V. Smith, an expert witness experienced in working with and testing the properties of glass (Tr. 135-138), who, based upon his personal examination and testing of the broken bottle (Ex. 2), stated that the bottle was fractured prior to appellant's attempt to open it (Tr. 158); that the fracture defects in the bottle were present and observable to the naked eye before the bottle left appellee's bottling plant (Tr. 159-160); that the defects developed during the bottling operation (Tr. 160-161); and that there was no evidence of any material damage to the bottle occurring after it left appellee's premises (Tr. 162).

Mr. Smith reasoned as follows (Tr. 159-160):

"Q. Now, Doctor (sic), based upon your examination and the facts I asked you to assume, do you have an opinion as to whether there were defects in the bottle observable to the naked eye before the bottle left the Defendant's plant, the bottler's plant?

"A. Yes, I have an opinion.

"Q. What is your opinion?

"A. That defects were there.

"Q. On what do you base that opinion?

"A. The facts are quite evident to me from a technical standpoint that the bottle in normal condition, the cap in normal condition, that its seal could not be broken by mere opening attempts which do not even distort the cap. That is the primary significance. Bottles just don't fall apart. The fact that the cracks emerge and radiate from under the cap at the point of cap crimping, and the fact that both cracks propagate from that position downward, is supporting strength, and considerable supporting strength to the fact that a machine operation produced these cracks, weakened the bottle by actually producing cracks and fractures through the glass to the point where it now is somewhat like the glazier's glass that has the scratch in it. This to me has had a crack in it from the capping operation, and in the absence of no surface damage that would come from normal handling in the store or the home."

As indicated by their pretrial contentions (Pretrial Order, R. 41, p. 7, contention No. 7), their trial brief (R. 80-84), their proposed instructions numbered 3 and 12 (R. 85-106), and their post trial memorandum in support of motion for a new trial (R. 109-116), appellants have consistently predicated their right to recover upon the alternative theories of (1) appellee's negligence and/or (2) appellee's breach of its implied warranty that the bottle in which it sold its product was reasonably fit and suitable for its intended use.

However, the trial court by refusing to inform the jury of appellants' breach of warranty contention (Tr. 363-364) and by refusing to present to the jury appellants'

proposed Instructions 3 and 12, restricted the trial in its liability aspect to the sole question of appellee's negligence (Tr. 366, l. 17). Appellants took timely exception to the District Court's refusal to grant the instructions cited (Tr. 383).

QUESTIONS PRESENTED

1. Did the District Court err in failing to present appellants' breach of warranty contention to the jury?

2. Did the District Court err in failing to present to the jury appellants' proposed Instructions 3 and 12?

3. Did the District Court err in entering judgment for appellee based upon the verdict of the jury?

4. Did the District Court err in denying appellants' Motion for a New Trial?

SPECIFICATION OF ERRORS

1. The District Court erred in refusing to charge the jury that appellants contended that the injuries sustained by appellant Margie J. Elliott had resulted proximately and directly from the breach by the defendant of its warranties of fitness and suitablity of the product "Like" for the purpose represented and intended.

2. The District Court erred in refusing to present to the jury appellants' proposed Instruction No. 3, which reads as follows:

> "The defendant, as a bottler of food stuffs, impliedly warranted to the plaintiff and other customers of its products that the bottles in which its product was sold were reasonably fit for the purpose for which they were intended.

"If you find that the bottle which broke in plaintiff's hand was defective to the extent that it was not reasonably fit for use as a bottle for the soft drink, that the defect was present before the bottle left the defendant's control, and that the defect caused plaintiff's injuries, your verdict must be for the plaintiff.

"Negligence is not an element of required proof when recovery is sought for breach of a warranty, and no evidence is necessary to establish recovery for a breach of warranty."

3. The District Court erred in refusing to present to the jury appellants' proposed Instruction No. 12, which reads as follows:

"It is not necessary that plaintiff prove both the defendant's negligence and a breach of warranty. If you find either that the defendant was negligent in one or more respects, or that the defendant breached a warranty, and that such negligence or breach of warranty caused plaintiff's injuries your verdict shall be for the plaintiff."

4. The District Court erred in entering judgment upon the verdict of the jury.

5. The District Court erred in denying appellants' Motion for a New Trial.

SUMMARY OF ARGUMENT

1. The District Court in a diversity case assumes all functions of the highest State appellate court, and thus has a duty to determine how that appellate court would decide the matter in issue.

2. The Washington State Supreme Court would, without substantial doubt, hold that the issue of implied warranty, and the breach thereof, should have gone to the jury.

3. The Washington State Supreme Court would so decide because

(1) The present-day trend toward abolition of the privity requirement and the invoking of warranty-based liability is overwhelming;

(2) Cases from several jurisdictions have predicated liability upon breaches of warranty with respect to bottles containing foodstuffs;

(3) The interrelationship between a foodstuff and the container in which it is packaged is close and logically indistinguishable; and

(4) The Washington State Supreme Court has consistently extended the common law warranty of fitness and suitablity to products other than foodstuffs.

4. The failure to submit the warranty issue to the jury substantially prejudiced appellants by casting upon them the burden of showing appellee's negligence—a burden which an action based upon a breach of warranty does not require.

ARGUMENT

I. A Federal Court in a Diversity Case Sits as the Highest State Court

Appellants submit it to be axiomatic that a Federal court in a diversity case assumes all functions of the highest State appellate court. *Wehrman v. Conklin*, 155 U.S. 314, 324, 15 S.Ct. 129, 39 L.Ed. 167 (1894), is one of the innumerable cases supporting the stated axiom. Consequently, it is the duty of the Federal court to determine how the highest State appellate court would de-

cide the matter in issue. *Meredith v. City of Winterhaven*, 320 U.S. 229, 64 S.Ct. 7, 88 L.Ed. 9 (1943). The duty attaches even though the question as to State law is novel. *Standard Accident Insurance Co. v. Leslie*, 55 F. Supp. 134 (D. Ill., 1944); *Versluis v. Town of Haskell*, 154 F.2d 935 (10 Cir., 1946).

II. The Washington State Supreme Court Would Decree That the Warranty Issue Should Have Been Submitted to the Jury

Research indicates that the issue of warranty application to a bottle in which a foodstuff is packaged has never been presented to the Washington State Supreme Court. However, appellants assert that that court, without substantial doubt, would hold that the issue of implied warranty and the alleged breach thereof, should have gone to the jury.

Appellants' assertion is based upon (1) the strong judicial trend toward invoking warranty-based liability, (2) cases from other jurisdictions holding bottlers liable for breaches of warranties with respect to containers in which products are sold, (3) the logically indistinguishable relationship between a foodstuff and the bottle in which it is packaged, and (4) the consistent extension by the Washington State Supreme Court of the common law warranty of fitness and suitability to products other than foodstuffs.

III. The Judicial Extension of Warranty-Based Liability

As so aptly summarized by Dean William L. Prosser in his article, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L. Rev. 791 (1966), the courts of this nation have consistently extended the doctrine of

implied warranty in invoking liability upon manufacturers, or other processors, in favor of ultimate consumers of a variety of processed articles. The extension of such liability has been predicated upon broad-scale judicial abolition of privity requirements.

This clearly recognizable trend toward strict liability to the consumer has been codified by the American Law Institute in its Second Restatement of Torts, Section 402 (A) which reads as follows:

> "§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
>
> "(2) *The rule stated in Subsection* (1) *applies although*
>
> "(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> "(b) *the user or consumer has not bought the product from or entered into any contractual relation with the seller.*" (Emphasis supplied)

The many examples of cases holding a manufacturer, or other processor, liable to a consumer because of breach of warranty include *Goldberg v. Rollsman Instrument Corp.*, 191 N.E.2d 81-82 (N.Y., 1963), a holding by New York's highest appellate court that an action by the per-

sonal representative of a deceased airline passenger would lie against the airplane manufacturer, wherein the court stated:

> "The question now to be answered is: does a manufacturer's implied warranty of fitness on his product for its contemplated use run in favor of all its intended users, despite lack of privity of contract?
>
> "The *Randy Knitwear* opinion (11 N.Y.2d p. 16, 226 N.Y.S.2d p. 370, 181 N.E.2d p. 404) at least suggested that *all requirements or privity have been dispensed with in our State.* That is the immediate, or at least the logical and necessary result of our decision. . . . (Emphasis supplied)
>
> "A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the vender or manufacturer.
>
> "As we all know, a number of courts outside New York State have for the best of reasons dispensed with the privity requirement. . . ."

Similarly, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), holds that an automobile purchaser, injured because of a defective steering mechanism, could sue the auto manufacturer directly despite the lack of privity. *Santor v. A and M Karagheusian*, 207 A.2d 305 (N.J. 1965), expanded the *Henningsen* holding beyond personal injury cases stating:

> ". . . we hold that plaintiff, as ultimate purchaser, may maintain his action directly against the defendant manufacturer . . . for breach of its implied warranty of reasonable fitness. We hold, also, that *privity of contract between them is not necessary* and that such action may be prosecuted even though plaintiff's damage is limited to loss of value of the carpeting."

In the same context, *Inglis v. American Motors Corp.*, 209 N.E.2d 583, 585 (Ohio, 1965), in holding that an action would lie by the purchaser of an automobile against its manufacturer for damages measurable by the difference between the actual value of the auto and the value the market would have attached to the auto had various representations of the manufacturer been true rather than false, stated:

> "*. . . in the recent past the courts of many jurisdictions, in an endeavor to achieve justice for the ultimate consumer, have imposed an implied warranty of reasonable fitness on the person responsible for the existence of the article and the origin of the marketing process.* From the standpoint of principle, we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively-made product has caused personal injury, and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it." (Emphasis supplied)

Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965), is in accord.

IV. Cases Predicating Liability Upon Breaches of Warranty With Respect to Bottles

The question whether an implied warranty attaches to a bottle or other container in which the product is packaged has been presented to courts of many jurisdictions. Those cases are collated in 81 A.L.R.2d 229 ("Liability of Manufacturer or Seller of Product Sold in Container Or Package for Injury Caused By Container or Packaging").

The majority of jurisdictions deciding the question have held the warranty doctrine applicable where, as in the

instant case, there is evidence indicating that the container became defective while in the custody or control of the bottler or other processor.

Cases holding that the bottler, or other packager, warrants the fitness and suitability of the container in which a product is sold include *Florida Coca-Cola Bottling Co. v. Jordan,* 62 So.2d 910 (Fla., 1953); *Canada Dry Bottling Co. v. Shaw,* 118 So.2d 840 (Fla. App., 1960); *Renninger v. Foremost Dairies, Inc.,* 171 So.2d 602 (Fla. App., 1965); *Mead v. Coca-Cola Bottling Co.,* 108 N.E.2d 757 (Mass. 1952); *Hadley v. Hillcrest Dairy, Inc.,* 171 N.E. 2d 393 (Mass., 1961); *Mahoney v. Shaker Square Beverages,* 102 N.E.2d 281 (Ohio, 1951); *Geddling v. March,* 1 K.B. 668 (England, 1920); *Vallis v. Canada Dry Ginger Ale, Inc.,* 11 Cal. Reptr. 823, 190 Cal. App.2d 35 (Cal. App., 1961); *Jones v. Burgermeister Brewing Corp.,* 18 Cal. Reptr. 311, 198 Cal. App.2d 198 (Cal. App., 1962); *Vassallo v. Sabatte Land Co.,* 27 Cal. Reptr. 814, 212 Cal. App.2d 11 (Cal. App., 1963); *Faucette v. Lucky Stores, Inc.,* 33 Cal. Reptr. 215, 219 Cal. App.2d 196 (Cal. App., 1963).

In *Canada Dry Bottling Co. v. Shaw,* 118 So.2d 840, 842, *supra,* the court, in holding both the retailer and the bottler liable because of breaches of warranty for damages sustained by a purchaser injured when attempting to open a bottle, states:

> "While this court would not, at this time, extend the doctrine of implied warranty to all containers of food, in this case the bottle and its contents are so closely related that it is difficult—if not impossible—to draw a distinction."

The court further commented, at 118 So.2d 843, that no

notice of a breach of warranty need be given the botttler because

> "It is universally known that when one purchases a bottle of Canada Dry Club Soda, it will be opened preparatory to use."

Parenthetically, it is noted that the Florida Supreme Court, in *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), a case arising from the breakage of a glass container in which reducing pills were sold, disapproved *Canada Dry Bottling Co. v. Shaw*, to the extent that warranty-based liability was imposed upon the *retailer.*

However, the *Foley* case is a reaffirmation of the principle that *a bottler* impliedly warrants the fitness of the container. Thus, at 177 So.2d 229, the court stated:

> "It is obvious that the *bottler* is in a position equivalent to that of a *manufacturer* of a product; and our holding in the *Florida Coca-Cola Bottling Co.* case (*Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910, *supra*) is in accord with the modern trend of authority in this country." (Citing 81 A.L.R.2d 229.)

Moreover, in *Renninger v. Foremost Dairies, Inc.*, 171 So.2d 602, 604, *supra*, a remand to the trial court directing that judgment for the plaintiff be entered upon a jury verdict, it is stated:

> "In *Canada Dry Bottling Co. v. Shaw*, Fla. App. 1960, 118 So.2d 840, it was recognized that the implied warranty of fitness may include the container or bottle in which the product is offered for sale. Accordingly, the purchaser of a bottle of milk is entitled to rely on the bottler to the extent that the container in which the product is packaged will be reasonably fit for the purpose for which it was intended."

Appellants submit that the distinction made by the

Florida courts between a bottler and a retailer is valid. The retailer is in no better position to discover a defective container than is the purchaser or consumer. However, essential fairness and practicality decrees that the bottler, as in the instant case, bear the prime responsibility for assuring the fitness and suitability of the containers which it places in the channels of commerce.

Thus, where as in the instant case there is evidence probative of a defect in a bottle, the existence of the defect prior to the bottle leaving the bottler's control, and normal handling of the bottle thereafter, appellants respectfully submit that the question of a breach of warranty by the bottler should be decided by the trier of the facts.

Mead v. Coca-Cola Bottling Co., 108 N.E.2d 757, 758, *supra*, supports appellants' assertion. There, the Massachusetts court, in affirming judgment against a bottler for a plaintiff who had sustained injuries while opening a bottle of beverage purchased from a vending machine, stated:

> "The evidence was sufficient to warrant a finding that the bottle was handled by the plaintiff in a manner to be expected by the seller of the beverage and that the bottle was defective."

V. A Warranty as to a Foodstuff Must Logically Extend to the Container in Which It Is Packaged

The Washington State Supreme Court has consistently stated that a common law warranty of fitness and suitability applies, *regardless of privity*, to the sale of foodstuffs. *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633 (1913); *Nelson v. West Coast Dairy*, 5 Wn.2d 284, 105

P.2d 76 (1940); *Guisness v. Scow Bay Packing Co.*, 16 Wn.2d 1, 132 P.2d 740 (1942); *LaHue v. Coca-Cola Bottling, Inc.*, 50 Wn.2d 645, 314 P.2d 421 (1957).

Appellants submit that the relationship between a foodstuff and the bottle in which it is packaged is so intertwined that it would be completely illogical to invoke a warranty as to the foodstuff and withhold the warranty protection to the consumer where a defective bottle, rather than the foodstuff in the bottle, causes the damage. As expressly recognized in *Canada Dry Bottling Co. v. Shaw*, 118 So.2d 840, 842, *supra*, and implicitly recognized in the other cases hereinbefore cited, any attempt to draw a distinction between a foodstuff and its container, in cases of this nature, is illogical.

The bottler, at the time it places a commodity upon the market, knows not only that the beverage will be consumed, but that the bottle will be opened preparatory to such consumption. The consumer's injuries from a broken bottle are just as foreseeable as those resulting from the bottle's contaminated contents.

VI. The Policy of the Washington State Supreme Court Is to Extend the Common Law Warranty of Fitness and Suitability

Freeman v. Navarre, 47 Wn.2d 760, 767, 289 P.2d 1015 (1955), an *en banc* decision of the Washington State Supreme Court, clearly indicates the policy toward abolition of the privity requirement and the extension of warranty-based liability in stating:

> ". . . it appears that a realistic, judicial analysis and reappraisal of the privity rule would be quite appropriate. However, that may be, such a reap-

praisal is unnecessary for the disposition of the appeal in the case at bar."

Two subsequently decided decisions by the Washington court substantiate the implementation of a policy of extending the warranty doctrine. Thus, *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 354-355, 378 P.2d 298 (1963), states:

> "As heretofore indicated, implied warranties of fitness and merchantability by a manufacturer, where found in the absence of privity, arise from the common law. *LaHue v. Coca-Cola Bottling, Inc., supra. We have*, since the time of *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913), *imposed upon manufacturers of food products common-law implied warranties of merchantability and fitness despite lack of privity.*
>
> "In *Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848, we applied an implied warranty of fitness for purpose (R.C.W. 63.04.160(1)) to a retail sale of clothing, *one of the premises being that no sound distinction could be drawn between a harmful product taken internally, i.e., food, and wearing apparel meant to be worn next to the skin.* By the same token, it would appear to us, no such distinction could be drawn as to a cosmetic intended to be applied to the hair, scalp or skin.
>
> "*We conclude the trial court did not err in imposing a common-law implied warranty of merchantability upon defendant manufacturer.*" (Emphasis supplied)

Appellants submit that the Washington State Supreme Court would also find no sound logical distinction between a foodstuff and the bottle in which it is packaged.

Similarly, in *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 190-193, 401 P.2d 844 (1965), the Washington State Supreme Court recognized and approved the trend to-

ward expansion and extension of the warranty doctrine. Thus, the court stated:

> "The right of an injured person to recover from a manufacturer or retailer for breach of implied warranty in the absence of privity of contract presents what might well be described as the Sargasso Sea of the law. It is filled with entangling theories, rules and doctrines from which courts throughout the United States and England have been atttempting to extricate themselves for decades. Since 1842, when the Court of Exchequer decided the case of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402, *the law has been constantly developing and growing as it keeps pace with changing social philosophy and expanding methods of manufacturing and distribution. There is a certain and steady trend in the direction of fixing greater responsibility in manufacturers and sellers.* Prossers on Torts ch. 19, p. 658, *et seq.* (3d ed.). (Emphasis supplied)
>
> . . .
>
> "In fairness to the trial judge who reluctantly felt constrained to dismiss the case following opening statement of counsel, *it must be recognized that we are now dealing with new vistas in the field of implied warranty.*" (Emphasis supplied)

VII. The Failure to Submit the Warranty Issued to the Jury Substantially Prejudiced Appellants By Casting Upon Them the Burden of Showing Appellee's Negligence — a Burden Which an Action Based Upon a Breach of Warranty Does Not Require

It is axiomatic that a plaintiff is not required to establish a defendant's negligence in order to recover for a breach of an implied warranty. *Lundquist v. Coca-Cola Bottling, Inc.*, 42 Wn.2d 170, 254 P.2d 488 (1953); *Friskeen v. Art Strand Floor Covering, Inc.*, 47 Wn.2d 587, 592, 288 P.2d 1087 (1955).

Thus, the District Court in the instant case, by failing

to submit to the jury appellant's cause of action based upon a breach of warranty, prejudicially imposed upon appellant a burden of proof beyond that which would have been required had the warranty action properly gone to the jury.

The prejudice to appellant inherent in the imposition of the additional burden of proof is compounded because any evidence of appellee's specific negligence is peculiarly within its exclusive knowledge and control.

As there is utterly no way of tracing the progress through appellee's bottling plant of the specific bottle which caused injury to appellant Margie J. Elliott, the burden of establishing negligence with respect to that particular bottle is almost insuperable.

Appellant submits that the overwhelming trend toward imposition of warranty-based liability constitutes a judicial recognition that evidence of a manufacturer's negligence almost universally lies solely within its knowledge, that the manufacturer (or other processor) is in a far better position to inspect its products and remedy any defects therein than is any other entity encountering the product in the channels of commerce, and that, accordingly, justice and practical necessity require that the entity placing a product in the marketplace impliedly warrants the fitness and suitability of the product *and the container in which it is packaged.*

CONCLUSIONS

Appellants offered credible proof that the bottle in question was defective before leaving appellee's premises; that the defective condition of the bottle was observable

to appellee; that the bottle was not physically abused after leaving appellee's control; and that appellant Margie J. Elliott sustained serious injuries as a direct result of the bottle's fragmentation because of the pre-existent defects.

Appellants submit that the Washington State Supreme Court, confronted with such proof, would manifestly decree that the question whether appellee breached an imimplied warranty of fitness and suitability should have gone to the jury.

Appellants respectfully request only that this case be submitted to a jury under proper instructions as to appellee's implied warranty.

Respectfully submitted,

BROZ, LONG, MIKKELBORG,
WELLS & FRYER
Robert O. Wells, Jr.
Jacob A. Mikkelborg
Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert O. Wells, Jr.
of Attorneys for Appellant

APPENDIX A

Table of Exhibits

Plaintiffs' Exhibit	*Marked*	*Received in Evidence*
1	26	28
2	29	30
3	67	123
4	155	157
5	198	199

Defendant's Exhibit	*Marked*	*Received in Evidence*
A-1	241	245
A-2	241	245
A-3	241	245
A-4	241	245
A-5	241	245
A-6	241	245
A-7	241	245
A-8	255	257
A-9	255	258
A-10	260	261
A-11	300	312
A-12	301	312
A-13	303	312
A-14	310	312